

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TONY R. HOLT)	
Claimant)	
VS.)	
)	Docket No. 1,017,485
TONY HOLT WELL SERVICE)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the September 7, 2006, Award entered by Administrative Law Judge Thomas Klein. The Workers Compensation Board heard oral argument on December 20, 2006.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Samantha N. Benjamin of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a July 4, 2003, accident and resulting low back injury. In the September 7, 2006, Award, Judge Klein found claimant had failed to prove an average weekly wage greater than the federal minimum wage of \$206 per week. Consequently, the Judge imputed \$206 as claimant's average weekly wage for purposes of determining his disability benefits. The Judge then found claimant did not prove that he had sustained any wage loss and, therefore, awarded claimant permanent disability benefits based upon the 15 percent whole person functional impairment rating provided by Dr. George G. Flutter.

Claimant contends Judge Klein erred. Claimant argues his pre-injury average weekly wage is \$445.19 based upon the profits from his well service company for 2002, the tax year before his work injury. Furthermore, claimant argues he has sustained a 100 percent wage loss for purposes of the permanent partial general disability formula because his well service company allegedly went from a profitable enterprise to a money-losing endeavor due to his low back injury.

In addition, claimant contends his permanent partial general disability benefits should be increased to 78.5 percent for a 57 percent task loss and a 100 percent wage loss. Finally, claimant argues his temporary total disability benefits should be adjusted based upon the correct average weekly wage.

Respondent and its insurance carrier request the Board to affirm Judge Klein's average weekly wage finding and affirm the Judge's finding that claimant's permanent partial general disability should be limited to his functional impairment rating. They also argue claimant proved neither wage loss nor task loss resulting from the July 2003 work injury. Accordingly, in their brief to the Board they request the Award be affirmed. But at oral argument before the Board, they requested the Board to modify the Award to reduce claimant's permanent disability to 10 percent, which was the whole person functional impairment rating provided by Dr. James K. Cole.

The issues before the Board on this appeal are:

1. What are claimant's pre-injury and post-injury average weekly wages?
2. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes this claim should be remanded to the Judge to determine claimant's average weekly wage based upon the receipts, expenditures, and profits of claimant's well service company for the 26-week period immediately preceding the July 4, 2003, accident.

Claimant is the sole proprietor of Tony Holt Well Service, which is an oil and gas well servicing company. The parties agree that on or about July 4, 2003, claimant injured his low back performing work on behalf of the well service company and that such accidental injury arose out of and in the course of his employment with the company.

As a result of that accident, claimant experienced symptoms in his back and left leg. Claimant initially received chiropractic treatment but he continued to have pain. He was then treated by Dr. James K. Cole, who initially provided conservative treatment and later

performed a discectomy between the third and fourth lumbar vertebrae (L3-4) in claimant's back. Claimant alleges he still has symptoms in his back and left leg if he does anything heavy. And according to claimant, because of those symptoms, he is not able to do as much in his well servicing work and, therefore, his company is not as profitable as it was before his injury.

Before his work injury, claimant did not pay himself a salary or any other type of regular draw from the well service company's receipts. Claimant argues the monies he received from the well service company were fixed as they were based upon the business' yearly profits. But the Board finds claimant's remuneration was not fixed. Instead, claimant's remuneration was based upon the profits of the business, which would fluctuate from year to year. In other words, claimant's remuneration would vary.

Disability benefits under the Workers Compensation Act are based upon an injured worker's average weekly wage. But the Act does not address how one is to determine an average weekly wage for a sole proprietor who does not receive a salary or who does not take regular draws. The Act, however, does provide that when remuneration is not fixed by the week, month, year or hour the average weekly wage is determined by looking at the 26 calendar weeks immediately preceding the accident. K.S.A. 2003 Supp. 44-511(b)(5) provides:

If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, **or on any other basis where the money rate is not fixed by the week, month, year or hour**, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, **the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be**, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. In making any computations under this paragraph

(5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered. (Emphasis added.)

Unfortunately, neither claimant's attorney nor the attorney for respondent and its insurance carrier presented evidence to establish the receipts, expenditures, or profits for respondent during the 26-week period immediately preceding claimant's July 4, 2003, accident.

Kansas Administrative Regulations (K.A.R.) require the parties in a workers compensation proceeding to be prepared to stipulate at the first hearing to a worker's average weekly wage. Moreover, the respondent is required to have wage information at the first hearing to answer any questions that might arise as to the worker's average weekly wage. K.A.R. 51-3-8 provides, in pertinent part:

The parties shall be prepared at the first hearing to agree on the claimant's average weekly wage except when the weekly wage is to be made an issue in the case. . . .

. . . .

(c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. . . .

Neither claimant's attorney nor the attorney for respondent and its insurance carrier presented this required information. Accordingly, it would have been better practice for the Judge to order the appropriate information be provided rather than to proceed to Award. As noted above, when the Judge recognized the evidence was deficient to prove claimant's pre-injury average weekly wage, the Judge imputed the federal minimum wage of \$206 per week.

This Board has on previous occasions remanded proceedings when a respondent has failed to provide the appropriate wage information.¹ And the fact that respondent is claimant's sole proprietorship does not relieve the attorney for respondent and its insurance carrier of its obligation to provide the information necessary to determine claimant's remuneration. The Board also recognizes the difficulty in trying to convert the receipts and expenditures from a business venture into something comparable to an average weekly wage. Finally, the Board recognizes that claimant as the sole proprietor

¹ See *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003); *Killman v. Focus Res-Care*, No. 233,268, 2001 WL 1399434 (Kan. WCAB Oct. 22, 2001).

of respondent possesses the information that the administrative regulations require respondent and its insurance carrier to present.

Considering the special circumstances presented, the Board believes this claim should be remanded for the limited purpose of (1) obtaining evidence regarding the receipts, expenditures, and profits of respondent for the 26-week period immediately preceding claimant's July 4, 2003, accident and (2) determining the nature and extent of claimant's injury and disability with that new evidence and the existing record. Of course, in lieu of presenting the evidence mentioned, the parties may decide to stipulate to claimant's pre-injury average weekly wage or, in the alternative, stipulate to use respondent's 2002 tax records to determine his average weekly wage.

AWARD

WHEREFORE, the Board remands the September 7, 2006, Award to Judge Klein for the limited purpose of (1) obtaining evidence regarding the receipts, expenditures, and profits of respondent for the 26-week period immediately preceding claimant's July 4, 2003, accident and (2) determining the nature and extent of claimant's injury and disability with that new evidence and the existing record. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

Dated this ____ day of January, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the majority's opinion and we would find that claimant failed to meet his burden of proof on the issue of average weekly wage. The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."³ In this instance it was claimant's burden to prove his average weekly wage and for whatever reason, sufficient information necessary to establish that fact was not placed into evidence. Regardless of the difficulty of doing so, it was claimant's burden to establish his pre-injury wage and he failed to do so. For this reason, we would not remand the claim.

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Jon L. Frobish, Attorney for Claimant
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

² K.S.A. 44-501(a) (Furse 1993).

³ K.S.A. 44-508(g) (Furse 1993).